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UNUM GROUP (formerly known as
UNUMPROVIDENT CORPORATION),
UNUM CORPORATION (a now non-existent
entity, properly referred to as Unum Group)
and METLIFE INSURANCE COMPANY
(successor in interest by merger to
NEW ENGLAND MUTUAL
LIFE INSURANCE COMPANY)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CLAUDIA L. BLAKE

Plaintiff,

vs.

UNUMPROVIDENT CORPORATION; UNUM CORPORATION, NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, COMMISSIONER OF THE CALIFORNIA DEPARTMENT OF INSURANCE, and DOES 1 through 20 inclusive,

Defendants.

Case No.: C07-4366 MHP

DEFENDANTS' POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO REMAND

Date: November 19, 2007
Time: 2:00 p.m.
Courtroom: 15

Accompanying Papers:

1. **Declaration of Susan Roth**
2. **Declaration of Michelle Backus**
3. **Request for Judicial Notice and Declaration of John C. Ferry**
4. **[Proposed] Order**

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COMES NOW Defendants UNUM GROUP (formerly known as UNUMPROVIDENT CORPORATION), UNUM CORPORATION (a now non-existent entity, properly referred to as Unum Group) and METLIFE INSURANCE COMPANY (successor in interest by merger to NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY) (hereinafter the "Insurance Defendants") and hereby submit these points and authorities in opposition to Plaintiff's motion to remand.

I. INTRODUCTION

A. Summary of Argument

This is yet another case in which Plaintiff's law firm has named the California Department of Insurance or the Insurance Commissioner as a defendant – not to obtain any remedy – but for the sole purpose of defeating diversity. Plaintiff's motion to remand must be denied as the Commissioner is a sham defendant because the cause of action for a writ of mandamus is not viable as a matter of law, the Plaintiff does not have standing to pursue the remedy she seeks and the statute of limitations has long since run on a claim arising out of the issuance of her insurance policy.

Further, diversity is well pled as the parties are completely diverse and the amount in controversy exceeds this Court's jurisdictional limit.

B. Procedural Background

Plaintiff filed her action on July 19, 2007. The Insurance Defendants were thereafter served with a copy of the summons and complaint on July 26, 2007 and filed and served their Notice of Removal, pursuant to 28 U.S.C. Section 1446(b), on August 23, 2007, within 30 days after service of the summons and complaint. Plaintiff's Motion for Remand was filed September 25, 2007, three days past the deadline to do so.

II. STATEMENT OF FACTS

Plaintiff's complaint alleges five causes of action. The following four causes of action are pled against the Insurance Defendants: Breach of contract (first cause of action; Complaint, ¶¶ 25-35); intentional/fraudulent and negligent misrepresentation (second cause of action; Complaint, ¶¶ 36-48); breach of covenant (third cause of action; Complaint, ¶¶ 49-68); and

intentional infliction of emotional distress (fourth cause of action; Complaint, ¶¶ 69-81).

Plaintiff's causes of action against the Insurance Defendants derive from two disability policies issued to her by New England Mutual Life Insurance Company, Policy Nos. 118455 and 118456. (Backus Declaration ¶¶ 3-6) Plaintiff received benefits for a period of time under each policy (Backus Declaration ¶¶ 3-6) but now claims additional back benefits are due (Complaint ¶ 33). As of the time of this writing, Plaintiff's back benefits claim is for $81,000. (Backus Declaration ¶¶ 3-6) Plaintiff also seeks future benefits which, given her age, would be approximately $192,000, if paid over her life time. (Back Declaration ¶ 7)

The fifth cause of action – the subject of this motion – is for writ of mandamus (Complaint, ¶¶ 82-93) – is alleged against the Commissioner of the California Department of Insurance (the "Commissioner"). After a recitation of purported duties imposed by the Insurance Code on the Commissioner, the complaint's charging allegations state:

> "…Commissioner has failed to enforce the mandatory minimum requirements of the Insurance Code with respect to POLICY definitions of disability and related POLICY provisions respecting proof of claim and payment of claim … that are at variance with and less favorable to their insureds and disability claimants than required by California law." (Complaint, ¶ 90)
>
> "… Commissioner has failed to perform the duties imposed upon him to require compliance with the California Insurance Code, including but limited to Sections 790.03(h) and 10291.5, as well as the Fair Claims Settlement Practices Regulations (10 Cal. Admin. Code Section 2695.1 *et seq)* and various DOI rulings and bulletins dealing with the same or similar subject matter." (Complaint, ¶ 91)
>
> "By the action, plaintiff seeks, in addition to all other remedies sought herein, an order from the Court mandating that the Commissioner perform the duties imposed upon him by law, as described hereinabove, and take corrective action as is reasonably necessary to respond to the fraudulent and unlawful conduct of said defendants, including but not limited to the correction of defendants' insurance POLICY forms to conform with California law." (Complaint, ¶ 93)
>
> Plaintiff's prayer for relief on the fifth cause of action states:
>
> "In addition to all other remedies sought herein, an order from the Court mandating that the Commissioner exercise reasonable discretion and take such action as he may decide is reasonably necessary to respond to the alleged fraudulent and unlawful conduct of defendants, including, but not limited to enforcing and monitoring compliance of claim Reassessments." (Complaint, Prayer for Relief ¶ 9)

Thus, Plaintiff seeks an order from this Court mandating that the Commissioner: (1) "perform the duties imposed upon him by law"; (2) to take "corrective action" regarding the Insurance Defendants' alleged conduct; and (3) re-write the policies at issue herein.

However, this Court is not empowered to do any of those things.

III. STANDARD ON REMAND

In her motion, Plaintiff paints a picture of a standard so stringent that no case involving fraudulent joinder could survive a motion to remand. The test, which is assuredly not insurmountable, has been described in different ways. Some cases analogize the fraudulent joinder analysis to the standard for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). See *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1319 (9th Cir., 1998). Others have asked whether the Plaintiff fails to state a cause of action against a resident defendant and the failure is obvious according to the settled rules of the state. *Morriss v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir., 2001). Still other cases compare the test to the standard for permissive joinder under Rule 11. See *Davis v. Prentiss Props, Ltd., Inc.*, 66 F. Supp.2d 1112, 1114 (C.D. Cal., 1999).

Under any analysis, "[i]f the Plaintiff fails to state a cause of action against a resident defendant and the failure is obvious according to the settled rules of the state, the joinder of the resident defendants is fraudulent." *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987).

That is the situation presented to this Court.

IV. DISCUSSION

A. The Commissioner Was Fraudulently Joined

Plaintiff's fifth cause of action fails because Plaintiff: (1) has failed to meet the statutory requirements for a mandamus action; (2) mandamus is not available to compel an official's discretionary act; (3) Plaintiff does not have standing to pursue a claim against the Commissioner for violation of the CSA and the reassessment program; and (4) Plaintiff's claims are time-barred. Hence, the Commissioner is a sham defendant whose presence cannot be employed to defeat diversity and whose consent to removal is not required.

1. A Writ of Mandamus Is Not Available to Compel An Official's Discretionary Act

A writ of mandamus may be issued "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office … or to compel the admission of a party to the use and enjoyment of a right … to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person." (CCP § 1085) A duty by the respondent, and the right of the petitioner to performance of that duty, constitute the dual requirements of mandamus relief:

> "Two basic requirements are essential to the issuance of the writ: (1) A clear, present and usually ministerial duty upon the part of the respondent …; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty." *People* ex rel *Younger v. County of El Dorado*, 5 Cal. 3d 480, 491 (1971)

Traditional mandamus "generally will lie only to compel the public official's performance of a duty which is purely ministerial in nature." *Young v. Gannon*, 97 Cal. App. 4th 209, 221 (2002) Where the public official is required by law to exercise his discretion, rather than perform a ministerial duty, mandamus will only lie to compel the exercise of his discretion under the proper interpretation of the law. *Id.* That is, mandamus will lie to correct an abuse of discretion, but to do so, petitioner "must show that the public official or agency invested with discretion acted arbitrarily, capriciously, fraudulently, or without due regard for his rights, and that the action prejudiced him." *California Teachers Assn. v. Ingwerson* 46 Cal. App. 4th 860, 867 (1996) Nevertheless, "[m]andamus will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner." *Common Cause v. Board of Supervisors*, 49 Cal. 3d 432, 442 (1989)

2. The Commissioner's Duty to Enforce the Insurance Code is Discretionary, Not Mandatory

The Commissioner has a discretionary duty, not a mandatory duty, to enforce Insurance Code § 790.03(h) against the Insurance Defendants. Plaintiff wrongly alleges that section 12926 imposed upon the Commissioner a mandatory duty to stop the Insurance Defendants' alleged violations of section 790.03(h) (Complaint, ¶ 84, 89) However, the Commissioner's decision to determine what constitutes a prohibited act, and whether to take action, is discretionary

according to statute. Section 790.03 defines certain prohibited acts by insurers. Section 790.035 states that a person who engages in the prohibited acts as defined in section 790.03 is liable to the state for a penalty to be fixed by the Commissioner. Importantly, section 790.035 makes explicitly clear that the "Commissioner shall have the discretion to establish what constitutes an act." (Ins. Code § 790.035) Moreover, while section 790.04 gives the Commissioner the power to examine and investigate insurers, section 790.05 gives the Commissioner the discretion to determine whether such an investigation is appropriate, saying:

> "whenever the Commissioner shall have reason to believe that a person has been engaged or is engaging in this state in any unfair method of competition or any unfair or deceptive act or practice defined in Section 790.03, and that a proceeding by the Commission in respect thereto would be in the interest of the public, he or she shall issue and serve upon that person and order to show cause …" (Ins. Code § 790.05)

Section 12926, which states the Commissioner shall require from every insurer full compliance with the provisions of the Insurance Code, does not override the specific statutory language contained in sections 790.035 and 790.05, which give the Commissioner discretion to investigate. Indeed, the provisions of the Insurance Code which the Commissioner should enforce, according to section 12926, explicitly give the Commissioner discretion to enforce section 790.03 *et seq.*

Woman Organized for Employment v. Stein, 114 Cal. App. 3d 133 (1980) is instructive here. *Stein* involved a similar claim as that raised here, that the Commissioner should be compelled to perform his "duties" with respect to Insurance Code section 790.03. The trial court sustained respondent's demurrer, without leave to amend, and the Court of Appeal affirmed, explaining "the 'duties' are … defined in the broadest of terms, and the Legislature has not specified any procedures to be employed in their performance. The Legislature's silence as to method necessarily imports that each of these officers is invested with discretion in selection and taking administrative action pursuant to the statutes reaching him." *Id.*, at 139. The Commissioner's duty in this regard is therefore discretionary, and not subject to review.

Just as it is wholly within the discretion of a district attorney to determine whether to prosecute (*People v. Vatelli*, 115 Cal. App. 3d 54, 58 (1971)), any decision by the Commissioner

as to when and how to perform his duties, and whether to take further action against the Insurance Defendants, is purely within his discretion, and mandamus will not lie to disturb the manner in which he exercises that discretion. (See, *Painting & Drywall Work Preservation Fund v. Aubry*, 206 Cal. App. 3d 682, 687 (1988); the Labor Commissioner cannot be compelled through a mandamus action to investigate complaints; *Fox v. County of Fresno*, 170 Cal. App. 3d 1238, 1244; duty under the Health & Safety Code to abate a nuisance could not be read to compel a public agency to act in any particular case; and *State of California v. Superior Court*, 12 Cal. 3d 327, 347-48 (1974) mandamus review of an official's discretionary decision over whether to issue a permit not proper.)

3. The Commissioner's Duty to Enforce and Monitor the Terms of the CSA Is Discretionary, Not Mandatory

Plaintiff's Prayer for Relief (but not her fifth cause of action) also seeks a writ of mandamus to compel the Commissioner to enforce and monitor the terms of the California Settlement Agreement ("CSA"). The CSA states that:

> "The Insurance Commissioner shall conduct examinations of the Claim Reassessment Unit's claim decisions and compliance with the other terms of the CSA, including changes made in claim handling practices and procedures contemplated by the CSA, all in the manner and at such intervals as he or she deems appropriate in accordance with the Insurance Code and Regulations." (Complaint, Ex C, at ¶ F.1, pg 10)

The Commissioner has the power to determine when and how he will monitor the Claims Reassessment unit, and therefore any determination to do so is an exercise of his discretion. As the court in *Rodriguez v. Solis*, 1 Cal. App. 4th 495, 501-502 explained:

> "A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists. Discretion, on the other hand, is the power conferred on public functionaries to act accordingly to the dictates of their own judgment." (Accord, *Kavanaugh v. West Sonoma County Union High School District*, 29 Cal. 4th 911, 916 (2003)

Plaintiff does not state a statute that gives the Commissioner a mandatory duty to monitor and require compliance with the terms of the CSA, nor can she. The Commissioner's duties in

regard to the CSA arise out of his discretionary duty to investigate and take action against insurers pursuant to sections 790.035 and 790.05. Those statutes give the Commissioner discretionary, not mandatory duties, thus there is no basis for Plaintiff to proceed on her fifth cause of action.

4. Plaintiff's Requested Relief Is Not Authorized by Law

Moreover, Plaintiff's fifth cause of action fails not only because Plaintiff cannot allege the violation of any mandatory duties by the Commissioner, but also because the relief requested is not authorized by law. Plaintiff seeks an order which would require the Commissioner to enforce and monitor compliance with the Reassessment process. (Complaint, Prayer ¶ 9) This relief would result in the Commissioner being ordered to exercise his discretion in a particular manner, a result not allowed by California law. *Common Cause v. Board of Supervisors, supra,* 49 Cal. 3d at 442.

Because section 790.03 *et seq* gives the Commissioner discretion to take action against insurers, this Court cannot substitute its judgment for the Commissioner's judgment in this matter, and is without authority to compel him to exercise his discretion in a particular manner. "Mandamus is not available to compel a governmental body to exercise its discretion in a particular manner." *Saathoff v. City of San Diego*, 35 Cal. App. 4th 697, 702 (1995); see also *State of California v. Superior Court, supra*, 12 Cal. 3d at 247 (holding "mandamus cannot be applied to control discretion as to a matter lawfully entrusted to a governmental agency"); *Common Cause v. Bd. of Supervisors, supra*, 49 Cal. 3d at 442.)

Simply put, Plaintiff seeks not an exercise of discretion, but an order compelling the Commissioner to take action that is at his discretion. This Court lacks the authority to grant this relief. Accordingly the cause of action for writ of mandamus is meritless as a matter of law.

5. Plaintiff Has an Adequate Remedy at Law

Plaintiff must further demonstrate that she has no other adequate remedy at law. CCP § 1086; *Omaha Indem. Co. v. Super. Ct. (Greinke)*, 209 Cal.App.3d 1266, 1274-1275 (1989). Here, there unquestionably is an adequate remedy.

First, Plaintiff may make a complaint with the DOI and request administrative action. The Commissioner and the DOI may issue directives pertaining to any terms Plaintiff contends are ambiguous. Yet, there are no allegations that Plaintiff ever complained to the DOI about any allegedly ambiguous policy terms.

Second, Insurance Code Section 10390 provides that to the extent that any policy provisions *are* at variance with the Code, the Code will prevail by law. A writ is not necessary to compel compliance and thus Plaintiff's writ amounts to an impermissible injunction to obey the law. FRCP 65(d); CCP § 525; *Calif. Satellite Systems, Inc. v. Nichols*, 170 Cal.App.3d 56, 71 (1985).

Third, Plaintiff's main remedy is this action. She contends Insurance Defendants have misinterpreted her policies and undoubtedly will ask the Court to interpret their terms in light of California law. A writ is not necessary to accomplish this objective, nor is the presence of the Commissioner. Plaintiff may address the issue within this action without suing the Commissioner for a writ of mandamus.

6. Plaintiff Fails to Show Irreparable Harm

Plaintiff fails to meet her burden of showing that she will suffer irreparable injury if a writ is not issued. *Omaha Indem Co., supra*, 209 Cal.App.3d at 1274-1275 (1989).

Whether the Commissioner has fulfilled his duties has no bearing on Plaintiff's claims. Plaintiff can pursue those claims against Insurance Defendants and seek a judicial interpretation to determine whether her alleged infirmities are a disability under the policy and California law. A favorable result would provide the relief she seeks; a writ is absolutely unnecessary to achieve this goal.

7. Plaintiff's Authority Does Not Support Her Position

Plaintiff's complaint does not seek revocation of any purported approval of the policy. However, in her remand motion, Plaintiff argues three cases hold a cause of action for revocation exists; *Peterson v. American Life & Health Ins. Co.* (9th Cir.1996) 48 F.3d 404, *Van Ness v. Blue Cross of Cal.* (2001) 87 Cal.App.4th 364, and *Brazina v. Paul Revere Life Ins. Co. et al.*, 271 F.Supp.2d 1163 (N.D. Cal. 2003). These cases do not support Plaintiff's action, for the reasons

stated below.

In *Peterson,* the insured filed suit against the insurer to obtain reimbursement for the cost of coronary bypass surgery. The Commissioner was not a party to the action. The court found nothing in the Insurance Code mandated coverage for coronary bypass surgery (*Peterson, supra,* 48 F.3d at 410) and in passing, stated dicta that is simply wrong. First, the court speculated that the Commissioner may revoke policy approval. However, Title 10 CCR section 2196.4, which the court cited as authority has nothing to do with disability insurance policies, it only applies to *property and casualty advisory organization policy and bond forms.* Further, it relies on Insurance Code sections 1855.1 through 1855.5 which expressly do not apply to disability insurance.

In addition, disability policy approval may only be withdrawn prospectively, not retroactively. Insurance Code section 10291.5(f), provides that the Commissioner may withdraw approval, but only after written notice to the insurer, for the reasons that the Commissioner may find to not approve the policy in the first place, and importantly, only "prospectively not retroactively."

Second, the court in *Peterson* erred in its dicta when it stated that an insured may seek a writ requiring the Commissioner to revoke his approval, an action the Commissioner is not authorized to perform. The Commissioner's approval of disability insurance policy forms is conducted in the absence of a hearing, and thus is not open to mandamus pursuant to CCP section 1094.5. "Section 1094.5 is applicable only when a hearing and the taking of evidence among other things are required." (*Keeler v. Superior Court* (1956) 46 Cal.2d 596, 599.) Rather, CCP section 1085 provides the grounds for mandamus, but it cannot be used to compel the performance of a specific act by a public official. (*State of California v. Superior Court, supra,* 12 Cal.3d 237, 247.)

Equally inapplicable is the court's opinion in *Van Ness,* a class action suit to which the Commissioner was not a party. The Court of Appeal held that the terms of the policy were not ambiguous and mentioned in dicta that the Commissioner had approved the policy, and surmised, citing the *Peterson* decision and the same incorrect authority (10 CCR § 2196.4), that

the Commissioner could revoke approval for good cause. (*Van Ness, supra,* 87 Cal.App.4th at 371-372.) That dicta is wrong for the reasons stated above

Finally, this Court's opinion in *Brazina,* was based on the prior rulings in *Peterson* and *Van Ness*, which, as addressed above, do not support Plaintiff's position. Quite simply, Plaintiff has a plain speedy and adequate remedy – this lawsuit -- and Commissioner cannot be compelled to exercise his discretion.

Because Plaintiff cannot allege a claim for mandamus, her fifth cause of action does not provide a basis for remand.

8. Plaintiff Has No Standing to Seek a Remedy Arising from the Reassessment Program and CSA

Plaintiff lacks standing to claim a remedy for relief that arises from the reassessment program for two reasons.

First, the complaint is totally bereft of any allegation that Plaintiff participated in the reassessment program. By failing to 'opt-in' to the reassessment program (Complaint, Ex C, ¶ B, at pg 7) Plaintiff lost any purported status she might have as a beneficiary under the CSA and waived the right to and is estopped from suing to enforce anything related to the CSA or the reassessment.

By her failure to participate, Plaintiff has no viable argument to present regarding the Commissioner's alleged failure to 'enforce and monitor' the reassessment process. Nothing the Commissioner could have done regarding reassessment could possibly impact Plaintiff in any way. Thus, not only does she not have standing to pursue this claim, she has no substantive evidence or basis to pursue those claims.

Second, the CSA and the reassessment program are only directed at: Unum Life Insurance Company of America, Provident Life and Accident Insurance Company and Paul Revere Life Insurance Company. (Complaint, Ex C, ¶ I, at pg 1) Yet, the policies issued to Plaintiff and which are the subject of this litigation were issued by New England Mutual Life Insurance Company. (Complaint, Ex A) Hence, the CSA and the reassessment program have no relevance to this matter, all allegations to the contrary notwithstanding.

9. Plaintiff's Claims Against the Commissioner Are Time-Barred

a. Plaintiff's Fifth Cause of Action Is Subject to the Three-Year Limitations Period

Plaintiff's fifth cause of action is governed by CCP section 1085 and the applicable statute of limitations depends upon the nature of the obligation to be enforced. *Ragan v. City of Hawthorne*, 261 Cal.Rptr. 219, 222 (Cal.App.1989). Here, the court initially must look to the Insurance Code to determine whether it provides any statute of limitations in actions to review determinations by the Commissioner. Insurance Code section 10291.5(h) provides that review of an action by the Commissioner shall be in accordance with the Code of Civil Procedure. *See Allen v. Humboldt County Board of Supervisors*, 220 Cal. App. 2d 877, 882-85 (1963); *Aroney v. California Horse Racing Bd.*, 145 Cal. App. 3d 928 (1983).

Because Plaintiff has asserted statutory rights under the Insurance Code, the applicable statute of limitations period is three years for "[a]n action upon a liability created by statute." CCP § 338(a); *see Pearson v. County of Los Angeles*, 49 Cal.2d 523, 540 (1957); *Dillon v. Board of Pension Commrs.*, 18 Cal.2d 427, 430-31 (1941).

b. Plaintiff's Claim Accrued When She Was Allegedly Harmed by the Commissioner

With the statute of limitations established the next step in the analysis is to determine when Plaintiff's claim accrued. Plaintiff argues that the accrual date should be when her claim was denied by Insurance Defendants. However, that perspective presupposes that her mandamus claim is directed at the Insurance Defendants, yet the allegations are directed against the Commissioner, from whom a remedy is sought.

Simply put, it is not the actions of the Insurance Defendants that trigger Plaintiff's claims against the Commissioner, but rather, ***the acts or omissions of the Commissioner***. The timeliness of Plaintiff's claims against the Commissioner do not depend on when Plaintiff was allegedly harmed by Insurance Defendants, rather, on when (if ever) Plaintiff was harmed by the Commissioner. Nothing else makes sense. Consequently, the accrual date must be triggered by something the Commissioner did or did not do.

Compelling this determination is the damage that the insured would argue she suffered. She claims not to have received the policies she bargained for, that is to say, policies that comply with California law. Thus, her remedy is not measured by the damages of a claim denial (that remedy is afforded Plaintiff in her contract and torts claims directed against Insurance Defendants) but rather, a refund of premiums. If the Commissioner's approval of the subject policy forms harmed Plaintiff, Plaintiff experienced that harm when, in exchange for her premium payments, she received insurance policies that the Commissioner should not have approved.

Indeed, upon receipt of the policies Plaintiff had an opportunity and an obligation to read them to confirm that they are what she had purchased before paying premiums. *Malcolm v. Farmers New World Life Ins. Co.*, 4 Cal. App. 4th 296, 304, n.6 (1992); *see also Hackethal v. National Casualty Co.*, 189 Cal. App. 3d 1102, 1108-11 (1987). Plaintiff's receipt of the policies therefore gave her constructive notice that the Commissioner had approved of their terms, and her acceptance of the policies without objection now precludes her from contending otherwise. *Aetna Casualty & Surety Co. v. Richmond*, 76 Cal. App. 3d 645, 652 (1977).

It therefore follows that, as of 1987 (Complaint, Ex. A), Plaintiff had both notice of facts sufficient to put a prudent person on inquiry about the Commissioner's approval of the policies and the means for discovering those facts. *Sime v. Malouf*, 95 Cal. App. 2d 82 (1949). The judicial admissions in Plaintiff's complaint therefore conclusively establish that her claim against the Commissioner accrued no later than 1987, that is, 20 years before she filed the complaint in this action. *See, e.g., American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224 (9th Cir. 1988) (Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them.) Thus, Plaintiff's failure to seek judicial review of the Commissioner's approval until more than 20 years after she received the policies, establishes that her claim against the Commissioner is untimely. *Id.* If Plaintiff's tactic were accepted, there would never be a limit to mandamus since a claimant could always name the Commissioner and contend he approved ambiguous terms no matter how far back in time from the issuance of the policy.

In her moving papers, Plaintiff relies heavily on a ruling by Judge Jenkins in *Sullivan v. Unum Life Ins. Co. Of America*, 2004 U.S. Dist. LEXIS 7010 (N.D. Cal. 2004) to support her limitations argument. Defendants submit that the better reasoned opinion was issued by Judge Walker in *Borsuk v. Massachusetts Mutual Life Insurance Company, et al.*, 2003 U.S. Dist. LEXIS 25259 (N.D. Cal. 2003) and that it is to *Borsuk* that this Court should look for guidance.1

In *Borsuk*, Judge Walker analyzed CCP section 338 and determined that the three year statute of limitations applied. Judge Walker concluded:

> Borsuk was on notice of the terms of the second issued policy no later than 1992, the date he agreed to the terms of the policy. This action was commenced ten years after that date and (presumably) more than ten years after the policy form at issue was approved. The complaint provides no support for any conclusion other than that Borsuk's claims against the commissioner are time-barred.
>
> If [i]t is pellucid that by the time the complaint in question was filed...the statute of limitations had long since run, time-barred claims against an in-state defendant cannot be asserted to defeat diversity. [Citation.] Borsuk has asserted only time-barred claims against the commissioner for mandamus relief. Because relief on those claims, even if those claims are valid, is no longer available based on the applicable statute of limitations, Borsuk has failed to assert claims against the commissioner on which relief may be granted. Accordingly, the court must conclude that the commissioner has been named in ther action as a sham defendant. (*Borsuk* order at pp. 17-18.)

To rebut *Borsuk*, Plaintiff advances Judge Jenkins' order in *Sullivan*. However, the *Sullivan* order is predicated entirely on the finding that: "[i]t seems unfair to hold categorically that Plaintiff had notice of the way defendants would administer the policy" before benefits were denied. *Sullivan, supra*, at 11. But the issue is not how Insurance Defendants administered the policy, it is whether the policies should have been approved by the Commissioner. Again, it is

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1 The same issue is again before Judge Walker in *Alan Sukin v. State Farm Mutual Auto. Ins. Co., et al*, Case No. C07-2829. The remand motion has been briefed and submitted. A similar motion is pending before Judge Hamilton: *Hughes v. Unumprovident Corporation, et al.*, Case No. C07-4088. Plaintiff's counsel has filed her opening brief and the matter is set for hearing on November 28, 2007. (Ferry Declaration, ¶¶ 9, 10). The Commissioner has also filed demurrers in two similar cases pending in San Francisco Superior Court. The demurrers were sustained with leave to amend and the Commissioner has filed a second demurrer in each case. The combined hearing on those demurrers is scheduled for November 27, 2008. (Request for Judicial Notice, Ferry Declaration, ¶¶ 3-8, 11, Exs A and B).

the action of the Commissioner and not the Insurance Defendants that is at issue here. Moreover, Plaintiff has a remedy to address how the policies were administered by Insurance Defendants and that is the primary one she is pursuing – breach of contract and her attendant (if ill-pled) tort causes of action against Insurance Defendants.

Thus, Plaintiff's remedy will not be affected, and no unfairness will attach to an order denying remand.

Accordingly plaintiff's fifth cause of action against the Commissioner is time barred and cannot be used to support remand.

V. THE ONLY PROCEDURAL DEFECTS LIE WITH PLAINTIFF

A. Plaintiff Waived All Procedural Objections to the Commissioner's Nonjoinder in the Removal By Filing a Tardy Remand

Plaintiff argues on remand that Defendants' Notice of Removal is procedurally defective due to the Commissioner's nonjoinder in the removal. Remand at 25. A motion to remand for a procedural defect must be made within 30 days after the filing of the removal notice. 28 U.S.C. § 1447(c). It is well-established that failure to join all defendants in the removal is a "procedural" defect and failure to timely raise that objection waives it to prevent remand on this basis. *See Northern Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1038 (9th Cir. 1995) ("a district court lacks power to issue a remand order in violation of section 1447(c)"); *Manilar v. FDIC*, 979 F.2d 782, 786 (9th Cir. 1992) (holding that failure to comply with the 30-day time limit for remand deprives a district court of power to order remand on the basis of a defect in removal procedure); *Concorde Financial Corp. v. Value Line, Inc.*, 2004 U.S. Dist. LEXIS 2040, *11 (S.D.N.Y. 2004) ("a district court has no power to remand a case to state court on the basis of a defect in the removal procedure"); *Wilson v. Suzuki of Orange Park, Inc.*, 2005 U.S. Dist. LEXIS 34207, *18 (M.D. Fla. 2005) (same). Defendants' Notice of Removal was filed on August 23, 2007. The deadline for Plaintiff's remand was September 22, 2007. Plaintiff did not file her motion until September 25, 2007, thereby waiving the objection regarding the Commissioner's nonjoinder.

B. The Citizenship Allegations are Properly Pled

Contrary to Plaintiff's allegations in her remand motion, the parties to this action are diverse.

Plaintiff is a citizen of California (Complaint, ¶ 1)

The Unum Group (formerly known as defendant Unumprovident Corporation) is a general corporation organized under the laws of the State of Delaware, with its principal place of business located in Chattanooga, Tennessee. Defendant Unum Corporation no longer exists as a legal entity. (Roth Declaration, ¶¶ 3-6)

Defendant Metlife Insurance Company is the successor in interest by merger to defendant New England Mutual Life Insurance Company. MetLife Insurance Company is incorporated in the State of New York with its principal place of business in New York City, New York. (Request for Judicial Notice, Ferry Declaration, ¶ 12, Ex C)

C. The Amount in Controversy Satisfies the Jurisdictional Limits

The amount at issue in this action exceeds the Court's $75,000 jurisdictional limit.

New England Mutual Life Insurance Company's Policy No. D118455, issued to Plaintiff provides a maximum monthly benefit of $2,000 to age 65. (Complaint, Ex A) Plaintiff submitted a claim under Policy No. D 118455 and received benefits for the period May 21, 2004 through March 1, 2005 in the amount of $18,733.33. No further payments have been made under this policy. (Backus Declaration, ¶¶ 3, 5)

New England Mutual Life Insurance Company's Policy No. D118456, issued to Plaintiff, provides a maximum monthly benefit of $3,000 for 12 months, or $36,000. Plaintiff submitted a claim under Policy No. D 118456 and received benefits for the period May 21, 2004 through December 1, 2004 in the amount of $19,000. No further payments have been made under this policy. (Backus Declaration, ¶¶ 4, 6)

Thus, as of November, 2007, Plaintiff's claim for back benefits under Policy No. 118455 is $64,000 (March 1, 2005-October 31, 2007; 32 months x $2,000). Plaintiff's claim for back benefits under Policy No. 118456 is $17,000.00 ($36,000-19,000.00). Accordingly, Plaintiff's total claim for back benefits as of the time of this motion is $81,000.00 ($64,000 + 17,000.00) an

amount in excess of the Court's jurisdictional limits.

In addition, Plaintiff further claims that she is entitled to future benefits under Policy No. 118455. Plaintiff was born in 1950 (Complaint, Ex A) hence, her claim for future benefits would extend to 2015. That is approximately 8 years in the future. If Plaintiff were paid benefits to 2015, that amount would be approximately $192,000. Her claim for the present value of this sum alone exceeds the jurisdictional limits. (Backus Declaration, ¶ 7)

Thus, Plaintiff's contract claim alone (without an examination of her claim for emotional distress, bad faith, attorneys fees, costs and punitive damages) exceeds the jurisdictional limits of this Court.

VI. CONCLUSION

For the reasons set forth above, the Insurance Defendants respectfully submit that jurisdiction properly lies in this Court and that Plaintiff's motion to remand should be denied.

KELLY, HERLIHY & KLEIN

Date: October 25, 2007

By _____
John C. Ferry
Attorneys for Defendants
UNUM GROUP (formerly known as UNUMPROVIDENT CORPORATION), UNUM CORPORATION (a now non-existent entity, properly referred to as Unum Group) and METLIFE INSURANCE COMPANY (successor in interest by merger to NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY)

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